SUPREME COURT, U. S.
Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 370

GEORGE E. FARRELL, as Administrator *de bonis non* of the Estate of WYAND F. DOERNER, JR., deceased,

DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,

JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,

DANIEL DONNELLY, as Administrator *de bonis non, cum testamento annexo* of the Estate of J. DUDLEY HUTCHINSON, deceased,

DANIEL DONNELLY, as Administrator *de bonis non, cum testamento annexo* of the Estate of J. DUDLEY HUTCHINSON, JR., deceased,

ANDREW P. O'ROURKE, as Administrator of the Estate of C. L. HUTCHERSON, JR., deceased,

GERALD A. ROBBIE, as Administrator *de bonis non* with will annexed of the Estate of JOSEPH EMILE BERMAN, deceased,

PAUL S. EDELMAN, as Administrator *de bonis non* with will annexed of the Estate of ELLEN S. LOVE, deceased,

PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,

PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,

PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,

AMERICAN BANK & TRUST COMPANY, as Administrator *cum testamento annexo* of the Estate of JAMES HENRY STUART, deceased, and

AMERICAN BANK & TRUST COMPANY, as Administrator *cum testamento annexo* of the Estate of THOMAS C. WHITE, deceased,

Petitioners,

v.

PIEDMONT AVIATION, INC., THE BOEING COMPANY and UNITED STATES OF AMERICA,

Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEE S. KREINDLER,
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New York, New York 10016,
Counsel for Petitioners.

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Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the

Second Circuit, affirming judgments of the United States District Court for the Southern District of New York, entered in the above-entitled case on April 29, 1969.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix B hereto, *infra*, has not as yet been reported. The opinion of the United States District Court for the Southern District of New York, printed in Appendix B hereto, *infra*, has been reported in 295 F. Supp. 228.

Questions Presented

1. Whether the constitutional guarantees of equal protection of and privileges to all citizens were breached by the courts below in denying New York petitioners-administrators the provisional remedy of attaching tortfeasors' property solely because the decedents and their beneficiaries were not residents of New York, identical attachments having been recognized as constitutionally available to New Yorkers.

2. Whether the courts below contravened their constitutional obligation in this diversity jurisdiction case to apply New York law which grants the remedy of attachment irrespective of the residence of plaintiffs-petitioners or their decedents and beneficiaries.

Jurisdiction

The judgment of the United States Court of Appeals was entered on April 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The statutory provisions involved are: Federal Rules of Civil Procedure 64 and New York Civil Practice Law and Rules §§ 5201(a), 6201(1) and 6202. They are printed in Appendix A, *infra.*

Statement

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 as to the four corporate defendants due to the existence of diversity of citizenship: all plaintiffs were citizens of New York, and each of the said defendants was a corporation duly organized under the laws of and with its principal place of business in a state other than New York. As to defendant United States of America, the jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*

The instant wrongful death action was commenced on June 21, 1968 in the United States District Court for the Southern District of New York. The action was brought on behalf of the estates of thirteen decedents who, while passengers for hire aboard a Boeing 727 jet aircraft operated by defendant Piedmont Aviation, Inc., and owned, manufactured and designed by defendant The Boeing Company, met their deaths when said jet collided in mid-air with a Cessna 310 aircraft over Hendersonville, North Carolina, on July 19, 1967. The Cessna was owned and operated by respondent Lanseair, Inc., the employer of the plane's co-pilot, and was also operated by respondent Rapidair, Inc., the employer of the pilot-in-command of the aircraft. Defendant United States of America's air traffic controllers were instructing both airplanes for the purpose of separating them during flight.

The wrongful deaths were caused by the intimately entwined negligence of the defendants. Thus, joinder in one

court of all parties-defendant was essential since omission of one would have provided the others with the opportunity to successfully defend by placing the entire blame upon the omitted defendant.

The New York Federal Court was the *only* forum in which the plaintiffs could join all defendants together (the circumstances underlying and substantiating this conclusion are detailed in a Petition for Writ of Mandamus and/or Prohibition, No. 2300 Misc., Oct. Term, 1969, filed by petitioners, to which the Court's attention is respectfully invited).

In personam jurisdiction was obtained over defendants Piedmont, Boeing and the United States. *Quasi in rem* jurisdiction was obtained over the respondents, defendants Lanseair and Rapidair, by attaching their respective aircraft liability insurance policies in New York. Said attachments served the additional and equal purposes of obtaining security for the payment of judgment. The combined total of the two policies is $550,000. Since eighty-two persons lost their lives in the mid-air collision, only a few of the death claims could be satisfied by the insurance coverage. Moreover, Lanseair and Rapidair possessed wholly inadequate corporate funds to satisfy more than a few additional claims.

Lanseair and Rapaidair moved to vacate the attachments, set aside service of process and dismiss the actions against them. The Honorable Inzer B. Wyatt, United States District Judge, Southern District of New York, granted said motions on November 27, 1968, and judgments were entered on December 2, 1968 as to Rapidair, and on December 10, 1968 as to Lanseair. Petitioners thereafter appealed to the United States Court of Appeals for the Second Circuit which affirmed the district court holding that the provisional remedy of attachment of a liability insurance obligation was not available to petitioners because their decedents and beneficiaries were not residents of New York.

Reasons for Granting Writ

Two bases justify the grant of this writ: first, by denying petitioners the provisional remedy of attachment solely by reason of the non-residence in New York of the decedents and their beneficiaries, the courts below breached the constitutional guarantees of equal protection of the laws and uniform recognition of the privileges accorded all citizens without discrimination as to their residence; and second, by denying petitioners the attachment remedy, the courts below contravened their constituitonal obligation in this diversity jurisdiction case to apply New York law which grants attachments to New Yorkers and non-residents alike.

Article IV, § 2 of the Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fourteenth Amendment, § 1 declares:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Equal protection of and equal privileges to all citizens, irrespective of their place of residence, is the pertinent hallmark of these constitutional rights. Correspondingly, no state may deny the "privilege of protection to creditors who are citizens of other States that it accords to its own citizens." *Owenby* v. *Morgan*, 256 U. S. 94, 109-10 (1921); *see also, Blake* v. *McClung*, 172 U. S. 239 (1898).

New York's highest court has specifically recognized that non-resident plaintiffs are entitled to the same rights

of attachment as New Yorkers. *Hibernia Nat'l Bank* v. *Lacombe*, 84 N. Y. 367 (1881); *accord, People's Trust Co.* v. *Goodell*, 134 Misc. 692, 236 N.Y.S. 549 (Sup. Ct. 1929):

> "We have refused to adopt the distinction made in some of the states, and have placed the right of a creditor coming here . . . upon the same footing as that of a citizen or resident creditor, and have sustained the lien of an attachment issued here. . . ." *Barth* v. *Backus*, 140 N. Y. 230, 239 (1893).

New York statutes grant this provisional remedy to any person without regard to his residence. N. Y. Civil Practice Law and Rules §§ 6202, 6201(1) and 5201(a). Attachments of various kinds of property have been upheld in favor of non-New Yorkers. *Katz* v. *Liston*, 22 App. Div. 2d 205, 254 N.Y.S. 2d 389 (1st Dept. 1964); *Bridges* v. *Wade*, 110 App. Div. 106, 97 N.Y.S. 156 (1st Dept. 1905); *Atkins* v. *Fitzpatrick*, 57 Misc. 341, 109 N.Y.S. 619 (Sup. Ct. 1908). Recently, attachments of debts identical to those at bar obtained by New York residents have been approved by New York's highest court, *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N.Y.S. 2d 99 (1966); *Simpson* v. *Loehmann*, 21 N. Y. 2d 305, 287 N.Y.S. 2d 633 (1967), *reargument denied*, 21 N. Y. 2d 990, 290 N.Y.S. 2d 914 (1968), and it has not denied non-residents such an attachment.

In *Minichiello* v. *Rosenberg*, —— F. 2d —— (2d Cir. April 2, 1969), the Second Circuit *en banc* held that it was constitutionally proper for a New Yorker to attach liability insurance debts of the same type as those involved in the instant case.

The courts below specifically held that the non-residence of petitioners' decedents and their beneficiaries was the sole basis for vacating the subject attachments. It is respectfully submitted that such discrimination between citizens, predicated solely on their residence, violates the

language and spirit of the equal protection and privileges clauses of the Constitution.

The district court was vested with diversity jurisdiction of petitioners' claims against respondents Rapidair and Lanseair, the insureds in the attached insurance policies, pursuant to 28 U.S.C. § 1332. *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1937), imposed the constitutional obligation upon the courts below to apply New York law as it exists, not as they believe it should exist. This mandate prohibits application of "federal common law" on constitutional grounds. *Id.* at 77-78.

Beyond this, Rule 64, F.R.C.P., provides that the provisional remedy of attachment shall be available in federal courts "in the manner provided by the law of the state in which the district court is held." New York attachment law was thus applicable. *See also, Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183 (1941).

New York statutes provide that this provisional remedy is available under certain specified conditions, all of which have been met by petitioners herein: (a) this is an action which seeks a money judgment [N. Y. C.P.L.R. § 6201]; (b) respondents Rapidair and Lanseair, by virtue of their incorporation in Missouri, are foreign corporations [N. Y. C.P.L.R. § 6201(1), N. Y. Bus. Corp. L. § 102(a)(7)]; and (c) the property in question (i.e., the liability insurance obligations) is a "debt". [N. Y. C.P.L.R. §§ 5201(a), 6202]. As to this third requirement, New York's highest court has held on two occasions that the obligations to defend and indemnify contained in a liability insurance policy is a "debt" within the meaning of the C.P.L.R. In *Seider* v. *Roth, supra,* the issue was succinctly presented and resolved as follows:

> "This appeal, taken by leave of the Appellate Division, brings us to a question new to this court—in a personal injury action against a non-resident defend-

> ant, is defendant's liability insurer's contractual obligation to defend and indemnify defendant a 'debt' owing to defendant and as such subject to attachment under CPLR 6202? Both courts below answered that question in the affirmative. We think that this is the correct answer." 17 N. Y. 2d at 112, 269 N.Y.S. 2d at 100.

In *Simpson* v. *Loehmann, supra,* New York's highest court held that the attachment of such a "debt" was not violative of due process:

> "[W]e perceive no denial of due process since the presence of that debt in this State . . .—contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him." 21 N. Y. 2d at 310, 287 N.Y.S. 2d at 636.

This due process requirement was satisfied in the case at bar by virtue of the fact that the two insurers and the syndicates managing them did considerable business in or had their principal offices in New York City. Thus the "debts" of each insurer to its respondent herein was located in New York.

The statutes dealing with attachment do not contain any requirement of residency on the part of the attaching plaintiffs. The reasons are obvious: first, attachment is nothing more than a remedy in aid of an ordinary action and there is no reason to deny it to a non-resident where he is entitled to bring the action itself; second, to do otherwise is violative of constitutional rights.

Indeed, for many years, New York cases emphasized this simple matter of logic by granting the remedy of attachment to non-residents, *Katz* v. *Liston, supra; Bridges* v. *Wade, supra; Atkins* v. *Fitzpatrick, supra,* and by treating

all citizens equally in this regard. *Barth* v. *Backus, supra; Hibernia Nat'l Bank* v. *Lacombe, supra; People's Trust Co.* v. *Goodell, supra.*

Even the district court below was constrained to admit that:

> Logically the *Seider* v. *Roth* attachments should not be affected by whether the action is for the benefit of a New York resident. The holding was that the insurance contract was a "debt" within the meaning of CPLR Sections 5201 and 6202 and was thus subject to attachment." (Appendix B, at 27.)

Nevertheless, the courts below, contrary to logic, the dictates of the statutes of New York and its highest court, and the Constitution, vacated the attachments for the sole reason that petitioners' decedents and their beneficiaries were non-New Yorkers.*

The rationale of the Court of Appeals below that "except for the doing of business by the insurers" there are "absolutely no New York contacts", begged the question and ignored the nature of *quasi in rem* jurisdiction. The situs of the *res* (i.e., the location of the insurers who were obliged to indemnify and defend respondents pursuant to the insurance policies) is the sole foundation of *quasi in rem* jurisdiction and, therefore, is the *only* contact of any jurisdictional or constitutional significance. Since the gar-

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* Even if it be assumed *arguendo* that attachments are available only to residents of New York, the fact is that petitioners are New York domiciliaries and the duly appointed administrators of their respective estates. As such they are the real parties in interest and exclusively vested with the authority to sue in New York for the deaths of the decedents. F.R.C.P. 17(a); C.P.L.R. § 1004. In short, if residency is material, it is that of the petitioners and not, as erroneously held by the courts below, that of their beneficiaries or decedents. *Mecom* v. *Fitzsimmons Drilling Co.*, 384 U. S. 183 (1931); *Mexican Central Ry.* v. *Eckman*, 187 U. S. 429 (1903); *Mechan* v. *Central R. R.*, 181 F. Supp. 594 (S.D.N.Y. 1960).

nishee insurance companies were licensed to do and did business in New York, due process requirements were satisfied and a New York forum is constitutionally available. *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); *Harris* v. *Balk*, 198 U. S. 215 (1905). The residences of the creditors (plaintiffs, decedents or beneficiaries) is thus irrelevant.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and, in addition, the courts below should be summarily reversed and the cause remanded with instructions to deny the motions to vacate the orders of attachment.

Respectfully submitted,

LEE S. KREINDLER,
MILTON G. SINCOFF,
GERALD A. ROBBIE,
RICHARD M. ZAROFF,
Counsel for Petitioners.

Appendix A

Statutes Involved

FRCP 64:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

N. Y. C.P.L.R. § 5201(a):

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

N. Y. C.P.L.R. § 6201(1):

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has de-

manded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. The defendant is a foreign corporation or not a resident or domiciliary of the state.

N. Y. C.P.L.R. § 6202:

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 105 shall be construed to mean "defendant."

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 444-456—September Term, 1968.

(Argued March 25, 1969 Decided April 29, 1969.)

Docket Nos. 33123, 33135-33146

GEORGE E. FARRELL, as Administrator *de bonis non* of the Estate of WYAND F. DORNER, JR., deceased,

DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,

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Appendix B

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AMERICAN BANK & TRUST COMPANY, as Administrator *cum testamento* of the Estate of THOMAS C. WHITE, deceased,

Plaintiffs-Appellants,

v.

PIEDMONT AVIATION, INC., THE BOEING COMPANY and UNITED STATES OF AMERICA,

Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Defendants-Appellees.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Appeals in a wrongful death action by New York citizens who were appointed as administrators of the estates of nonresident decedents, from orders of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* vacating attachments of the liability insurance policies of defendants Rapidair, Inc. and Lanseair, Inc., and judgments dismissing the complaint against them. Affirmed.

LEE S. KREINDLER (Kreindler & Kreindler, New York, N. Y., Milton G. Sincoff and Gerald A. Robbie, of Counsel), *for Plaintiffs-Appellants.*

Appendix B

JOHN J. MARTIN (Bigham, Englar, Jones & Houston, New York, N. Y., Robert F. Ewald, of Counsel), *for Lanseair, Inc.*

WALTER E. RUTHERFORD (Haight, Gardner, Poor & Havens, New York, N. Y.), *for Rapidair, Inc.*

EDWARD F. HAYES, III (Chadbourne, Parke, Whiteside & Wolff, New York, N. Y., P. G. Pennoyer, Jr. and Daniel J. O'Neill, of Counsel), *for Piedmont Aviation, Inc.*

BENJAMIN E. HALLER, New York, N. Y., *for The Boeing Company.*

PATRICIA M. HYNES, Ass't U. S. Attorney (Robert M. Morgenthau, U. S. Attorney for the Southern District of New York, Michael D. Hess, Ass't U. S. Attorney, of Counsel), *for United States of America.*

FRIENDLY, *Circuit Judge*:

These appeals are the latest fallout to reach this court from the much criticized decision in *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N.Y.S. 2d 99 (1966), which we have recently declined to declare unconstitutional on the facts presented in *Minichiello* v. *Rosenberg* and *Stevens* v. *Tyng*, —— F. 2d —— (1968), adhered to by the court *in banc*, in —— F. 2d —— (1969), slip opinions 575, 1751.

The action, brought in the District Court for the Southern District of New York, stemmed from the collision of a Boeing jet aircraft operated in commercial service by Piedmont Aviation, Inc., and a Cessna private aircraft owned by Lanseair, Inc. and operated by Rapidair, Inc. The crash occurred over North Carolina. All seventy-four passengers and five crew members of the Piedmont jet

and the pilot and both passengers of the Cessna were killed. Plaintiffs are New York citizens who have been appointed as administrators of the estates of 13 passengers of the Piedmont aircraft; eight of these were citizens of Mississippi, one of Texas, two of Tennessee, and two of Maryland.[1] The defendants are Lanseair, Rapidair, Piedmont, Boeing and the United States. Lanseair and Rapidair are Missouri corporations not subject to *in personam* jurisdiction in New York. Piedmont and Boeing, also foreign corporations, apparently were. Since they do not have their principal places of business in New York or in the states of residence of any of the decedents, there was diversity as between the plaintiffs and the corporate defendants even if it be proper to be behind the citizenship of the administrators, as recently held in *McSparran* v. *Weist*, 402 F. 2d 867 (3 Cir. 1968), petition for cert. filed, 37 U. S. L. W. 3201 (U. S. Nov. 25, 1968) (No. 772). Jurisdiction over the claim against the United States was conferred by 28 U.S.C. § 1346(b).

Plaintiffs' problem was how to acquire jurisdiction in New York with respect to Lanseair and Rapidair. They sought to meet it by availing themselves of *Seider* v. *Roth*, and attaching the liability insurance policies issued to Lanseair and Rapidair respectively by Federal Insurance Company and St. Paul Fire and Marine Insurance Company, both doing business in New York.[2] Lanseair, Rapidair and the two insurers responded with motions to vacate the attachments and to dismiss the action against

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[1] Some of the decedents died intestate; others left wills. All the beneficiaries of the potential wrongful death recovery are also non-New Yorkers.

[2] The policy limits were $250,000 for Federal and $300,000 for St. Paul, substantially less than the claims of the 13 plaintiffs in this action, not to speak of the many other persons killed whose representatives have sued in North Carolina and, we understand, elsewhere.

the two defendants. In addition to challenging the basic constitutionality of *Seider* v. *Roth*, they asserted that the procedure was inapplicable to an action in which the true beneficiaries were non-residents. Motions were also made by Piedmont and the United States under 28 U.S.C. § 1404(a) to transfer the action to the Western District of North Carolina, where many other suits arising out of the accident are pending. On November 27, 1968, Judge Wyatt granted both sets of motions; on December 2 and 10, 1968, the clerk entered judgments dismissing the complaint as against Rapidair and Lanseair, respectively. Another panel of this court has declined to interfere with the order of transfer, *Farrell* v. *Wyatt*, —— F. 2d —— (2 Cir. 1969), slip opinions 1515. The instant appeals are from the vacating orders and the judgments of dismissal.

At the outset we note and reject a challenge to our appellate jurisdiction. Lanseair and Rapidair contend that Judge Wyatt's orders left undisturbed a service of *in personam* process attempted over them after the attachments had been obtained; that final dismissal of the action against them was effected only by an order of the District Court for the Western District of North Carolina after the transfer; that the orders here under attack are thus interlocutory; and that review of them can be had only by an appeal in the Fourth Circuit from the order of dismissal.

The argument flies in the face of the language of Judge Wyatt's orders. These not only vacated the attachments but, the judge having made the determination required by F. R. Civ. P. 54(b), directed the clerk to enter judgment dismissing the actions against the two defendants "for lack of jurisdiction over the person." The judgments subsequently entered conformed to this direction. The record does not disclose why Lanseair and Rapidair thought it necessary to obtain further orders in the Western District of North Carolina vacating the attempted *in per-*

sonam service, and plaintiffs have scant reason to appeal from these since they can now effect such service on Rapidair and Lanseair under the North Carolina long-arm statute, N. C. Gen. Stat. § 1-107.3. The issue of practical importance is whether in the North Carolina litigation plaintiffs are entitled to a preferred position with respect to Rapidair's and Lanseair's insurance coverage by virtue of the New York attachments. That issue was decided in the Southern District of New York prior to the transfer and this court would be the most appropriate place for review even if Judge Wyatt had merely vacated the attachments and not entered orders of dismissal. Cf. *Swift & Co.* v. *Compania Colombiana del Caribe, S.A.*, 339 U. S. 684, 688-89 (1950). However, in light of the tenor of his orders appellants not only might but had to appeal from them here. We therefore proceeded to the merits.

Appellants' argument is straightforward—indeed, Judge Wyatt conceded it was "logical." Nothing in the New York attachment statute, CPLR § 6201(1), limits that remedy to residents. They say therefore that if Lanseair or Rapidair had owned tangible property in New York or had accounts in New York banks, the attachments would have been valid if made in a state court and consequently were so in a federal action, F. R. Civ. P. 4(e).[3] *Seider* v. *Roth*, and its

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[3] Appellants recognize that a New York court could nevertheless dismiss the action on the ground of *forum non conveniens*. See *Bata* v. *Bata*, 304 N. Y. 51, 105 N. E. 2d 625 (1952); *Vaage* v. *Lewis*, 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (2d Dept. 1968). Assuming that a similar dismissal would be available to a federal court despite the remedy afforded by 28 U.S.C. § 1404(a), appellants say this would be improper in the instant case. A North Carolina statute, N. C. Gen. Stat. § 28-8(2), 28-173, requires any action for the death of an intestate decedent to be brought by a North Carolina resident appointed as administrator and this would defeat diversity since Piedmont is a North Carolina corporation. On the other hand the United States could not be sued in a North

(*footnote continued on following page*)

successor, *Simpson* v. *Loehmann*, 21 N. Y. 2d 305, 287 N.Y.S. 2d 633 (1967), hold that the insurer's obligations to defend and to indemnify make the policy a "debt" attachable under § 6202. Q.E.D.[4]

(*footnote continued from previous page*)

Carolina state court. Hence a New York federal court is the only one in which jurisdiction over all these defendants can be had in an action on behalf of decedents who died intestate. For reasons later indicated, we find it unnecessary to consider this. However, the facts do demonstrate the desirability of legislation that would permit—or, indeed, require—all claims arising out of a major airplane accident to be litigated in a single federal court. See S. 961, 91st Cong. 1st Sess., introduced by Senator Tydings, Feb. 7, 1969.

[4] The parties have not discussed New York's statutory restriction on the maintenance of actions against foreign corporations. Business Corporation Law § 1314 provides that a New York resident or a domestic corporation may sue a foreign corporation in the state courts upon any claim, but a nonresident or a foreign corporation may sue another foreign corporation only when either the claim sued upon or the defendant corporation has specified connections with the state. See also General Corporation Law §§ 224-25. This limitation, "reflecting this State's policy against lending its courts to the resolution of disputes between nonresident parties," *Simonson* v. *International Bank*, 14 N. Y. 2d 281 (1962), limits the subject-matter jurisdiction of the courts and cannot be waived by the defendant. *Davis* v. *Kessler & Co.*, 194 N.Y.S. 9 (Sup. Ct. 1922); *Fidan* v. *Austral American Trading Corp.*, 168 N.Y.S. 2d 27 (Sup. Ct. 1957); *Electronic Race Patrol, Inc.* v. *National Trailer Convoy, Inc.*, 191 F. Supp. 364 (S.D.N.Y. 1961). The state courts have applied the restriction without regard to whether jurisdiction over the defendant was obtained *in personam* or by attachment *quasi in rem*. See *Banque de France* v. *Supreme Court*, 287 N. Y. 483, cert. denied, 316 U. S. 646 (1942); *Gano-Moore Coal Mining Co.* v. *W. E. Deegans Coal Co.*, 214 App. Div. 634 (1st Dept. 1925); *Cala* v. *Luis De Ridder, Ltda.*, 17 A. D. 2d 729 (1st Dept. 1962). The provision has been upheld against constitutional attack as a reasonable limitation on access to the courts, *Douglas* v. *New York, N. H. & H. R.R.*, 279 U. S. 377 (1929), and see *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U. S. 1 (1950), and a federal court sitting in a diversity case is bound to give it effect,

(*footnote continued on following page*)

Appendix B

Whatever the conceptual beauty of the argument, it neglects the facts. If we pass the New York citizenship of the administrators for the moment, the action is by nonresidents against other nonresidents who have no contacts with New York, and arises out of an occurrence in another state. In truth the defendants own nothing in New York or at least nothing that they do not "own" to the same

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see *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945); *First Nat'l Bank* v. *United Air Lines*, 190 F. 2d 493 (7 Cir. 1951), rev'd on other grounds, 342 U. S. 396 (1952)—although commentators have questioned both these propositions. See B. Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L.J. 1323, 1346-49, 1379-91 (1960); Hart & Wechsler, The Federal Courts and the Federal System 668-72 (1953).

If the nonresident accident victims represented by these plaintiffs were alive and were suing on their own behalf, we might thus be forced to conclude that Business Corporation Law § 1314 closed the federal courts' doors to them against appellees. It is a question of state law whether the action stands differently under that section simply because the victims have died and New York residents have been appointed to administer their estates. The state courts have long held, under § 1314 and its predecessors, that a resident to whom a claim has been assigned for the sole purpose of enabling him to bring suit may maintain an action in the state court although the assignor could not. See *McCauley* v. *Georgia R. Bank*, 239 N. Y. 514 (1924); *Banque de France* v. *Supreme Court, supra; Cincis* v. *Seaboard Air Line Ry.*, 113 N.Y.S. 2d 29 (Sup. Ct. 1952). Apparently this holds true as long as the assignment on its face transfers title, without regard to the consideration paid or the use to be made of the proceeds of the claim. *Segal Lock & Hardware Co.* v. *Markey*, 124 N.Y.S. 2d 181 (Sup. Ct. 1953). We might expect the state courts to be equally willing to countenance avoidance of § 1314 by appointment of a resident administrator, although we have not found a decision that establishes this. Cf. *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315 (1889); *Silberfeld* v. *Swiss Bank Corp.*, 50 N.Y.S. 2d 838 (Sup. Ct.), aff'd 52 N.Y.S. 2d 585 (1st Dept. 1944). In the absence of a contrary indication we proceed on the assumption that the state courts would not hold this suit barred by § 1314.

extent in every state; their insurers are bound to defend and indemnify them wherever they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants.

Not reaching the constitutional issue, the district court pointed to statements in the two leading New York cases which it regarded as indicating that the Court of Appeals would limit *Seider* to suits by residents. Chief Judge Desmond wrote in *Seider* that there was "no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont injuring New York residents," 17 N. Y. 2d at 114, 269 N.Y.S. 2d at 102. In *Simpson* Chief Judge Fuld said "the State has a substantial and continuing relation with the controversy" in a case "where the plaintiff is a resident of the forum state and the insurer is present and regulated by it," 21 N. Y. 2d at 311, 287 N.Y.S. 2d at 637, and Judge Keating's concurrence rested on the assumed constitutionality of permitting a direct action against the insurer by a New York resident even for an out-of-State accident, 21 N. Y. 2d at 312-14, 287 N.Y.S. 2d at 638-40. See also *Vaage* v. *Lewis*, 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (2d Dept. 1968). Appellants respond that these observations were simply descriptive of the cases *sub judice* and that, when faced with the problem here presented, the Court of Appeals would feel bound to apply the attachment statutes as their letter requires. We doubt this. A court that could perform the "miracle" on CPLR 320(c) that was effected in the opinion denying reargument in *Simpson* v. *Loehmann*, 21 N. Y. 2d 990, 290 N.Y.S. 2d 914 (1968), see *Minichiello* v. *Rosenberg*,

supra, —— F. 2d at —— & n. 7, slip opinions 584-87, would scarcely shrink from the easier task of saying that a liability insurance policy was a "debt" only when the plaintiff was a resident or was suing for a New York accident. This would be particularly true if the Court of Appeals considered that such a restrictive construction was needed to save *Seider* from unconstitutionality or even from serious constitutional doubt. See, e.g., *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346 (1928); *Lucas* v. *Alexander,* 279 U. S. 573, 577 (1929); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); *United States* v. *Rumely,* 345 U. S. 41, 45 (1953); *People* v. *Bell,* 306 N. Y. 110, 114 (1954); *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N. Y. 2d 379, 389, 240 N.Y.S. 2d 1, appeal dismissed, 375 U. S. 78 (1963). For reasons sufficiently indicated in *Minichiello* v. *Rosenberg. supra,* —— F. 2d at ——, ——, slip opinions at 581-83, and 1757-58 (concurring opinion of Judge Hays), and in this opinion, we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth,* in favor of nonresidents would be exceedingly serious.[5] While that may be an understatement, it would be enough to dispose of this case if the plaintiffs were nonresidents who had suffered injuries or nonresident representatives of nonresidents who had been killed.

The only remaining argument, that the plaintiffs here are New York citizens, requires little discussion. There

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[5] Appellants urge that limitation of *Seider* v. *Roth* to New York residents may itself create a constitutional problem. For reasons indicated in *Minichiello* v. *Rosenberg, supra,* —— F. 2d at —— n. 6, slip opinions at 583 n. 6, we see no basis for this where, as in that case, the only persons injured were residents or where, as here, nonresidents have invoked *Seider* but no resident has. We have reserved the question of constitutionality where a resident seeks to utilize *Seider* to obtain what amounts to a preference over a nonresident. See *Minichiello* v. *Rosenberg,* —— F. 2d at —— (*in banc*), slip opinions at 1756.

would be no basis in reason for different treatment of an action by a nonresident who suffered serious injuries or by a nonresident executor of a nonresident who was killed, on the one hand, and one by a New York citizen who had been appointed administrator of a nonresident decedent, on the other. The constitutional doubt arises from New York's lack of meaningful contact with the claim; a court of another state cannot supply this by picking a New Yorker as administrator of the estate of a nonresident who suffered fatal injury.

Affirmed.

Appearances

Kreindler & Kreindler, Esqs., Attorneys for Plaintiffs, 99 Park Avenue, New York, New York 10016, Lee S. Kreindler, Esq., Milton G. Sincoff, Esq., Gerald A. Robbie, Esq., William D. Siegel, Esq., Of Counsel.

Haight, Gardner, Poor & Havens, Esq., Attorneys for Defendant Rapidair, Inc., and Garnishee St. Paul Fire and Marine Insurance Company, 80 Broad Street, New York, New York 10004, John Asnato, Jr., Esq., Walter E. Rutherford, Esq., Of Counsel.

WYATT, District Judge.

This is a motion by defendant Rapidair, Inc. (Rapidair) and by a "garnishee" St. Paul Fire and Marine Insurance Company (St. Paul) for an order vacating the attachment of the insurance policy issued by St. Paul to Rapidair, setting aside the service of process and dismissing the action as against Rapidair.

The claims asserted in the complaint are by the personal representatives of 13 passengers on a Piedmont Airlines plane who died when the plane crashed after a midair collision on July 19, 1967. There were 74 pas-

sengers and 5 crew members in the Piedmont plane and the pilot and 2 passengers in the plane with which it collided; all died on both planes.

The collision was over Hendersonville, North Carolina, and the crash was near that town. Hendersonville is in Henderson County, one of the counties in the Western District of North Carolina, and is some 20 or 25 miles south of Asheville, one of the places where Court is held in the District.

The complaint avers that defendant Piedmont Aviation, Inc. (Piedmont) was operating as a common carrier the Boeing aircraft which crashed and in which the decedents of plaintiffs were passengers; that the defendant The Boeing Company (Boeing) designed, made and owned the aircraft; that defendant Lanseair, Inc. (Lanseair) owned and operated a Cessna aircraft; that defendant Rapidair, Inc. (Rapidair) also operated, maintained, etc. this Cessna aircraft; that the Boeing plane and the Cessna plane collided, causing the crash; that the collision was caused by the concurrent negligence of all the defendants; that Piedmont, Lanseair, and Rapidair failed to keep an adequate lookout; that Boeing designed the cockpit of its aircraft unreasonably to restrict the field of vision; and that the United States operated an air traffic control facility at Asheville Municipal Airport from which it communicated to the two planes but caused them to collide by failing to issue proper instructions, information and clearances.

Jurisdiction over the claims against the United States is based on a part of the Federal Tort Claims Act (28 U.S.C. § 1246[b]). Jurisdiction over the claims against the other defendants is said to rest on diversity of citizenship (23 U.S.C. § 1332).

Each of the plaintiffs is an administrator, with or without a will annexed, of one or more of the 13 passengers.

Eight of these passengers were citizens of Mississippi, one of Texas, two of Tennessee, and two of Maryland. Six of the decedents appear to have died intestate; eight appear to have left wills. Each of the plaintiff administrators is a citizen of New York.

It seems to be undisputed that Piedmont, Boeing, Rapidair and Lanseair each is incorporated under the laws of, and has its principal place of business in, a state other than New York, Mississippi, Texas, Tennessee or Maryland. Diversity jurisdiction over these defendants is established.

Plaintiffs moved this Court *ex parte* for an order of attachment of the property of defendants Rapidair and Lanseair, Inc. under the authority of Fed. R. Civ. P. 4(e) and 64, giving plaintiffs the benefit of State attachment laws. Rapidair and Lanseair are said (without contradiction) to be Missouri corporations with their principal places of business in Missouri. New York CPLR § 6201(1) authorized an order of attachment against a foreign corporation defendant. It was represented that United States Aviation Underwriters, Incorporated and United States Aircraft Insurance Group, both doing business in New York, had issued an aircraft liability insurance policy to Rapidair with respect to the Cessna plane involved in the collision.

Judge Frankel made an order of attachment which order was filed June 21, 1968. The Marshal served notice of levy on United States Aircraft Insurance Group specifying that the levy was on an "obligation to defend and indemnify Rapaidair, Inc. and/or Lanseair, Inc. under an Aircraft Liability Insurance Policy".

It turned out that a mistake had been made and that the insurer of Rapidair was St. Paul, which does business in New York. A supplemental order of attachment was made by Judge Bonsal and filed July 9, 1968. This order directed the attachment, as the property of Rap-

idair, of the policy issued by St. Paul. This policy had been issued by an agent of St. Paul in Illinois and had been delivered to Rapidair in Missouri. The Marshal served notice of levy on St. Paul in New York on July 11, 1968, specifying that the levy was on "the obligation to defend and/or indemnify Rapidair, Inc. contained in an aircraft liability Insurance Policy".

The validity of the attachment is determined by the law of New York, subject to federal constitutional limitations.

A sharply divided (4-3) Court of Appeals of New York has sustained an attachment which, with one significant difference, was like that at bar. *Seider* v. *Roth,* 17 N. Y. 2d 111, 209 N.Y.S. 2d 99 (1966).

The significant difference is that plaintiffs in *Seider* v. *Roth* were residents of New York and the action was being prosecuted for their benefit. The Court declared that there was "no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont *injuring New York residents* . . ." (17 N. Y. 2d at 114; emphasis supplied).

The question later came again before the Court of Appeals in *Simpson* v. *Loehmann,* 21 N. Y. 2d 305, 267 N.Y.S. 2d 633 (1967). Again plaintiffs were residents of New York and the action was prosecuted for their benefit. Again the Court (4-2) upheld the attachment. Two of the judges in the majority, however, voted to uphold the attachment "only on constraint of *Seider* v. *Roth*" (21 N. Y. 2d at 314) and while disagreeing with that decision, one of the two had in fact dissented in *Seider* v. *Roth;* those two judges voted to sustain the attachment "because the institutional stability of a court is more important than any single tolerable error" (21 N. Y. 2d at 316).

The opinion of Chief Judge Fuld, voting to sustain the attachment, emphasized the New York residence of plain-

tiffs: "Moreover, *where the plaintiff is a resident of the forum state* and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large" (21 N. Y. 2d at 311; emphasis supplied). Judge Burke in dissent was not certain that *Seider* v. *Roth* required that the plaintiff be a resident of New York at the time of the accident and suggested a possible "privileges or immunities" problem if it did (21 N. Y. 2d at 318 and fn. 3).

Logically the *Seider* v. *Roth* attachment should not be affected by whether the action is for the benefit of a New York resident. The holding was that the insurance contract was a "debt" within the meaning of CPLR Sections 6201 and 6202, and was thus subject to attachment.

It is concluded, however, that—whether logical or not—the Court of Appeals of New York would not uphold a *Seider* v. *Roth* type of attachment where the action is for the benefit of a nonresident of New York. This same conclusion has been reached in a unanimous decision of the Appellate Division, Second Department. *Vaage* v. *Lewis,* 29 A. D. 2d 315, N.Y.S. 2d (March 4, 1968).

Plaintiffs press upon me that they are indeed residents and citizens of New York. At the same time they are only nominal parties; admittedly the action is entirely for the benefit of persons residing outside the State of New York, who were so residing at the time of the fatal crash, and whose decedents were residing outside the State of New York.

So far as defendants Rapidair, Inc. and Lanseair, Inc. are concerned the action in this Court must fail. The reasons for bringing the action here are perfectly understandable and from the standpoint of plaintiffs it is

desirable to have all the alleged tortfeasors before the same Court. By separate order the action is being transferred to the United States District Court for the Western District of North Carolina. It appears likely that by virtue of a type of "long arm" statute in North Carolina (N. C. Con. Stat. § 1-107.3) plaintiffs will be able to make service on Rapidair, Inc. and Lanscair, Inc. and subject them to the in personam jurisdiction of the federal court in North Carolina, thus to a substantial extent accomplishing their purpose.

The motion of defendant Rapidair, Inc. and of St. Paul Fire and Marine Insurance Company is granted. The orders of attachment filed June 21, 1968 and July 9, 1968 and all levies made thereunder are vacated and set aside. The service of process on defendant Rapidair, Inc. is vacated and set aside. There is an express determination that there is no just reason for delay (Fed. R. Civ. P. 54[b]) and the Clerk is expressly directed to enter judgment in favor of defendant Rapidair, Inc. dismissing the action as against said defendant for lack of jurisdiction over the person.

So Ordered.

Dated: New York, New York
November 27, 1968

INZER B. WYATT,
United States District Judge.

Appendix B

[SAME TITLE]

This is a motion by defendant Lanseair, Inc. and by a "garnishee" Federal Insurance Company for an order vacating the attachment of the insurance policy issued by the garnishee to Lanseair, Inc., setting aside the service of process, and dismissing the action as against Lanseair, Inc.

A similar motion by defendant Rapidair, Inc. is being granted by order, with opinion, filed today. There must be the same disposition of this motion.

The motion of defendant Lanseair, Inc. and of Federal Insurance Company is granted. The orders of attachment filed June 21, and July 9, 1968 and all levies made thereunder are vacated and set aside. The service of process on defendant Lanseair, Inc., is vacated and set aside. There is an express determination that there is no just reason for delay (Fed. R. Civ. P. 54[b]) and the Clerk is expressly directed to enter judgment in favor of defendant Lanseair, Inc. dismissing the action as against said defendant for lack of jurisdiction over the person.

So Ordered.

Dated: November 27, 1968.

Inzer B. Wyatt,
United States District Judge.

SUPREME COURT U. S.

IN THE

Supreme Court of the United States

October Term, 1969

FILED
AUG 19 1969
JOHN F. DAVIS, CLERK

No. 370

GEORGE E. FARRELL, as Administrator de bonis non of the Estate of WYAND F. DOERNER, JR., deceased,
DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,
JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, JR., deceased,
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PAUL S. EDELMAN, as Administrator de bonis non with will annexed of the Estate of ELLEN S. LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of JAMES HENRY STUART, deceased, and
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of THOMAS C. WHITE, deceased,

Petitioners,

against

PIEDMONT AVIATION, INC., THE BOEING COMPANY, and UNITED STATES OF AMERICA,

Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Respondents.

BRIEF OF RESPONDENT RAPIDAIR, INC. AND GARNISHEE ST. PAUL FIRE AND MARINE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of JAMES HENRY STUART, deceased, and
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of THOMAS C. WHITE, deceased,
Petitioners,

against

PIEDMONT AVIATION, INC., THE BOEING COMPANY, and UNITED STATES OF AMERICA,
Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,
Respondents.

BRIEF OF RESPONDENT RAPIDAIR, INC. AND GARNISHEE ST. PAUL FIRE AND MARINE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Rapidair, Inc., and garnishee St. Paul Fire and Marine Insurance Company (hereinafter referred to as St. Paul) submit this brief in opposition to the petition filed by petitioners for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Citations to Opinions Below

The opinion of the United States Court of Appeals (Pet. App. B) has not as yet been reported. The opinion of the United States District Court for the Southern District of New York is reported at 295 F. Supp. 228.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Under New York law may *quasi in rem* jurisdiction over a non-resident defendant be obtained by attachment of said defendant's liability insurance policy in an action brought by a nominal New York plaintiff for the benefit of a non-resident to recover damages for an out-of-state tort?

2. If the answer to Question No. 1 is in the negative, does the refusal of New York to entertain a lawsuit based upon such an attachment contravene the privileges and immunities and equal protection provisions of the United States Constitution?

3. If the answer to Question No. 1 is in the affirmative, does such an attachment violate due process or constitute an impairment of the insurance contract in violation of the United States Constitution?

Statutes Involved

The pertinent provisions of the New York Civil Practice Law and Rules are set forth in Appendix A of the petition.

Statement

This is an action to recover for the alleged wrongful deaths of thirteen decedents (non-residents of the State of New York) who were killed on July 19, 1967, as a result of a mid-air collision between a Piedmont Aviation Boeing 727 aircraft and a Lanseair Cessna 310 aircraft near Hendersonville, North Carolina. *Quasi in rem* jurisdiction over Rapidair, who is alleged to have been operating the Lanseair aircraft at the time of the collision, and Lanseair was attempted by attachment of their respective aircraft liability insurance policies. On November 27, 1968, the Honorable Inzer B. Wyatt vacated said attachments on the ground that the *quasi in rem* attachment procedure was not available in an action for the benefit of non-residents of the State of New York, set aside the service of process, and directed that judgments be immediately entered in favor of defendants Rapidair and Lanseair. The Court of Appeals for the Second Circuit, in a unanimous opinion, affirmed the District Court.

On July 19, 1967, a Boeing 727 aircraft being operated as Flight 22 by Piedmont Aviation, Inc., departed the

Asheville, North Carolina, airport en route to Roanoke, Virginia. Shortly after takeoff from Asheville, Flight 22 collided near Hendersonville, North Carolina, with a Cessna 310 aircraft that was inbound to Asheville from Charlotte, North Carolina. At the time of the collision the Cessna 310 was owned by Lanseair, Inc., and was being operated by Lanseair on company business. It is alleged that at the time of said collision, the pilot operating the Lanseair aircraft was in the employ of Rapidair.

As a result of said collision, Wyand F. Doerner, Jr., Georgina Lopez Burden, Washington Lafayette Blackmon, Jr., J. Dudley Hutchinson, J. Dudley Hutchinson, Jr., C. L. Hutcherson, Jr., Joseph Emile Berman, Ellen S. Love, Lucy Ann Love, Ellen Cabot Love, William D. Love, V, James Henry Stuart, and Thomas C. White, all of whom were passengers on the Piedmont aircraft, were killed. At the time of their demise, decedents Doerner and Burden were residents and citizens of Maryland; decedent Blackmon was a resident and citizen of Texas; decedents Hutchinson, Hutchinson, Jr., Hutcherson, Berman, Ellen S. Love, Lucy A. Love, Ellen C. Love and William D. Love, V, were residents and citizens of Mississipi and decedents Stuart and White were residents and citizens of Tennessee.

Respondents Lanseair and Rapidair are Missouri corporations with their principal places of business in Missouri. Defendant Piedmont Aviation is a North Carolina corporation with its principal place of business in North Carolina. Defendant Boeing is a Delaware corporation with its principal place of business in the State of Wash-

ington. At the time of the accident, Rapidair was insured by St. Paul Fire and Marine Insurance Company, a Minnesota corporation with its principal place of business in Minnesota. The St. Paul policy was issued by its agent in Illinois and delivered to Rapidair in Missouri.

Decedents Blackmon, Hutchinson, Hutchinson, Jr., Berman, Ellen S. Love, Stuart and White died testate and executors for their estates were duly appointed by the appropriate probate courts. Prior to the institution of this lawsuit, all of the original executors of the aforementioned estates resigned their positions and requested the appointments of the present plaintiff-administrators.

Decedents Doerner, Burden, Hutcherson, Lucy A. Love, Ellen C. Love and William D. Love, V, all died intestate. Prior to the institution of this lawsuit, the original administratix of the Doerner estate resigned her position and requested the appointment of the present plaintiff-administrator. All of the other plaintiff-administrators were nominated by the decedents' next-of-kin.

All of the petitioners in this case, except for the American Bank & Trust Company, are employees, former employees or members, of the firm of Kreindler & Kreindler, attorneys for petitioners. All of the petitioners are residents and citizens of the State of New York.

The instant action was commenced on or about June 21, 1968, when petitioners obtained an order of attachment which directed the U. S. Marshal for the Southern District of New York to levy upon the contractual obligation

of United States Aviation Underwriters, Inc., and/or United States Aircraft Insurance Group "to defend and indemnify defendant Rapidair, Inc. under a policy of aircraft liability insurance issued by it to said Rapidair, Inc." After the levy had been made by the U. S. Marshal, United States Aviation Underwriters, Inc., and United States Aircraft Insurance Group filed a Garnishee's Statement in which they stated that neither insured Rapidair, Inc., and that St. Paul Fire and Marine Insurance Company was Rapidair's aircraft liability insurer.

Petitioners thereupon obtained *ex parte* on July 9, 1968, a supplemental order of attachment directing the U. S. Marshal to levy upon the contractual obligation of St. Paul Fire and Marine Insurance Company "to defend and indemnify defendant Rapidair, Inc. under a policy of aircraft liability insurance issued by it to said Rapidair, Inc." The U. S. Marshal subsequently levied upon the St. Paul policy on or about July 10, 1968. Service of process was then perfected on Rapidair, Inc., in Springfield, Missouri, on or about July 17, 1968.

Jurisdiction as to the corporate defendants is based upon diversity of citizenship, and as to defendant United States of America jurisdiction is based upon the Federal Tort Claims Act.

On September 5, 1968, Rapidair and garnishee St. Paul Fire and Marine Insurance Company moved to vacate the attachment, to set aside the service of process and to dismiss the complaint as to defendant Rapidair.

On November 27, 1968, Judge Wyatt rendered his opinion vacating the attachment of Rapidair's aircraft liability insurance policy, setting aside the service of process on Rapidair, and directing that judgment be immediately entered in favor of Rapidair. On November 27, 1968, Judge Wyatt also rendered an opinion transferring this case to the United States District Court for the Western District of North Carolina, pursuant to Title 28, United States Code, Section 1404 (a).

On December 2, 1968, a judgment was entered in favor of Rapidair, Inc., and on December 5, 1968, the file herein was mailed to the Clerk of the United States District Court for the Western District of North Carolina (Asheville Division), where it was received on or about December 10, 1968.

On December 27, 1968, petitioners filed their notice of appeal appealing from Judge Wyatt's order of November 27, 1968, which vacated the attachment of Rapidair's liability insurance policy, and from the judgment entered in favor of Rapidair pursuant to said order.

On or about February 6, 1969, petitioners also filed a petition for a writ of mandamus and/or prohibition challenging Judge Wyatt's order of November 27, 1968, transferring this action to the United States District Court for the Western District of North Carolina.

On March 18, 1969, the Court of Appeals for the Second Circuit denied the petition for a writ of mandamus (*Farrell v. Wyatt*, 408 F. 2d 662), and on April 29, 1969, affirmed the orders and judgments of the District Court

vacating the attachments as to respondents Rapidair and Lanseair.

On or about June 9, 1969, petitioners filed a motion and petition in this Court for a writ of mandamus and/or prohibition to the United States District Court for the Southern District of New York and the Honorable Inzer B. Wyatt, to vacate the order of November 27, 1968, which transferred this action to the United States District Court for the Western District of North Carolina (No. 2300 Misc. Oct. Term, 1969).

On or about July 23, 1969, the petitioners filed in this Court a petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit, entered on April 29, 1969, affirming judgments of the United States District Court for the Southern District of New York.

Argument

The petition for writ of certiorari should be denied because the issue presented by the petitioners herein seeks only an interpretation of local New York law which is ordinarily not reviewable by this Court; the law of New York was properly applied by the District Court and the Court of Appeals; and if the attachment herein should be reinstated as petitioners contend, it would violate due process and impair the obligations of the insurance contract between Rapidair, Inc., and St. Paul Fire and Marine Insurance Company.

POINT I

Interpretation of Local Law is ordinarily not reviewed by the Supreme Court.

An examination of the petition reveals that petitioners' basic argument herein is that the District Court and the Court of Appeals misinterpreted the New York attachment statute. It has been well established that this Court does not ordinarily review the holdings of lower courts on matters of interpretation of state law. *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U. S. 456, 462, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967); *Pierson* v. *Ray,* 386 U. S. 547, 558 fn. 12, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 204-5, 76 S. Ct. 273, 100 L. Ed. 199 (1955); *Steele* v. *General Mills, Inc.,* 329 U. S. 433, 438-9, 67 S. Ct. 439, 91 L. Ed. 402 (1947); *MacGregor* v. *State Mutual Life Assurance Co.,* 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942). The decisions of the lower courts, sitting in New York, were based upon their interpretation of the local New York law and involved no constitutional issues.

POINT II

The decisions below are clearly correct.

Both the District Court and the Court of Appeals held that the attachment of a non-resident defendant's insurance policy in order to confer *quasi in rem* jurisdiction on a New York court in an action brought to recover damages on behalf of non-residents injured as a result of an out-of-

state tort was not permissible under the New York case decisions interpreting the New York attachment statute. This interpretation of New York law is clearly correct.

The applicable New York law may be found in three decisions: *Seider* v. *Roth,* 17 N.Y. 2d 111 (1966); *Simpson* v. *Loehmann,* 21 N.Y. 2d 305 (1967), motion for rearg. den. 21 N.Y. 2d 990 (1968), and *Vaage* v. *Lewis,* 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (Second Dept. 1968). It is clear from an analysis of *Seider, Simpson,* and *Vaage* that the procedural device of obtaining *quasi in rem* jurisdiction over a non-resident defendant by attachment of his liability insurance policy is for the purpose of protecting New York State residents injured in out-of-state accidents and is not available to non-residents.

In *Vaage* v. *Lewis,* 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (Second Dept. 1968), the defendants' insurance carrier was doing business in the State of New York, but the injured plaintiff was not a New York resident. In a unanimous opinion, the Appellate Division for the Second Department, in vacating the attachment and dismissing the complaint, held:

> "A close reading of *Seider* and *Simpson* and the commentaries on those cases shows that the New York residency is a crucial consideration * * *
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> "The plaintiff is a nonresident. The solitary nexus for the New York courts is the fact that the defendants' insurance carrier is a foreign corporation authorized to do business in New York. Under no circumstances could these facts support an exercise of jurisdiction by the New York courts without adversely

affecting the administration of justice in this State by an influx here of unwanted and unnecessary lawsuits (*Pietrarcia* v. *New Jersey & Hudson Riv. Ry. & Ferry Co.*, 197 N.Y. 434). We are obliged under the circumstances of this case, where no special considerations are advanced, to dwell on the aptness of the forum non conveniens doctrine. Essentially, it is the convenience of our courts, not that of the litigants, and the practical ramifications which determine the acceptance or rejection of the doctrine in a particular case (*Williams* v. *Seaboard Air Line R. R. Co.*, 9 A D 2d 268; see, also, *Gilchrist* v. *Trans-Canada Air Lines*, 27 A D 2d 524). For this compelling reason, and also because we believe that an exercise of jurisdiction in this case would deprive the defendants of basic due process (*Hanson* v. *Denckla*, 357 U. S. 235; see *Lefcourt* v. *Sea Crest Hotel & Motor Inn*, 54 Misc. 2d 376), the order shold be reversed, on the law, without costs, and the defendants' motion granted." 29 A. D. 2d at 316, 318.

The *Vaage* case, so far as appears, was never appealed to the New York Court of Appeals, so that the opinion of the Appellate Division stands as the law of New York.

The unavailability of the *Seider* attachment procedure to non-residents of the State of New York was recognized by the Court of Appeals for the Second Circuit in *Minichiello* v. *Rosenberg*, 410 F. 2d 106, wherein Judge Friendly wrote:

"We thus believe that, all things considered, the Supreme Court would sustain the validity of a state statute permitting direct actions against insurers doing business in the state in favor of residents as well as on behalf of persons injured within it. * * * Since, on the other hand, we doubt that the Court

> would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence, we equally doubt whether *Seider* could validly be applied in such a case." 410 F. 2d at 110.

And in a concurring opinion to the *en banc* decision, Judge Hays stated:

> "Although I read Judge's Friendly's opinion as finding the *Seider* procedure acceptable only when plaintiffs are residents of New York, I believe that it is worthwhile to put additional stress on this point and to make it completely clear that our opinion refers only to the situation where plaintiffs are New York residents." 410 F. 2d at 120.

While it is true that the present plaintiff-administrators are residents and citizens of the State of New York, their presence herein is contrieved and is a subterfuge. The decedents and their next-of-kin were all non-residents. The original personal representatives were non-residents. New York State residency was deliberately created in this lawsuit. Furthermore, the petitioners herein are only nominal parties. They have no interest in the outcome of this litigation. As personal representatives they prosecute this action as mere statutory trustees, suing for the benefit of each decedent's next-of-kin. *Davenport* v. *Patrick*, 227 N.C. 686, 44 S.E. 2d 203 (1947); *In re Ives Estate*, 248 N.C. 176, 102 S.E. 2d 807 (1958).

In an attempt to inject some constitutional argument in order to justify the filing of the petition for a writ of certiorari, petitioners have argued (1) that the lower courts did not follow their constitutional obligation in

diversity cases and apply the New York law as it exists, which in the opinion of petitioners does not differentiate between residency and non-residency in the attachment of liability insurance policies in order to confer *quasi in rem* jurisdiction, and (2) that if the attachment procedure is unavailable because of non-residency, the constitutional rights of the petitioners under the Privileges and Immunities and Equal Protection clauses of the United States Constitution have been violated.

Petitioners' argument that the lower courts did not follow the decisions of the New York courts is simply erroneous. The emphasis in both the *Seider* and *Simpson* decisions was on the protection to be afforded New York residents. If *Seider* and *Simpson* were unclear, *Vaage* v. *Lewis,* 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (Second Dep't 1968), was explicit: a non-resident injured in an out-of-state accident could not avail himself of a *Seider* attachment in order to confer on a New York court *quasi in rem* jurisdiction over a non-resident defendant. Where the state law is clear, even though it may have been declared by an intermediate appellate court, the federal courts are obligated to follow and apply that law in diversity cases. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940); *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284 (1940); *Six Companies of California* v. *Joint Highway Dist. No. 13,* 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114 (1940); *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940); *Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U. S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). The New York law as to attachment

of liability insurance policies to confer *quasi in rem* jurisdiction has obviously been correctly applied by the lower federal courts in this case.

Petitioners' alleged constitutional argument under the Privileges and Immunities and Equal Protection clauses of the Constitution is equally untenable. In *Vaage* v. *Lewis,* 29 A.D. 2d 315, 288 N.Y.S. 2d 521 (Second Dep't 1968) the New York Court held that a *Seider* type attachment was not available to a non-resident on the ground of *forum non conveniens* "and also because we believe that an exercise of jurisdiction in this case would deprive the defendants of basic due process (*Hanson* v. *Denckla,* 357 U. S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283; see *Lefcourt* v. *Sea Crest Hotel & Motor Inn,* 54 Misc. 2d 376, 282 N.Y.S. 2d 896)." 29 A.D. 2d at 318, 288 N.Y.S. 2d at 525.

It is well established that a state may deny non-residents access to its Courts on the ground of *forum non conveniens,* and that such a denial does not impinge on the non-resident's constitutional rights. *Douglas* v. *New Haven R. Co.,* 279 U. S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929); *Missouri ex. rel. Southern Railway Co.* v. *Mayfield,* 340 U. S. 1, 71 S. Ct. 1, 95 L.Ed. 3 (1950); *Minichiello* v. *Rosenberg,* 410 F.2d 106, 110 fn. 6 (2d Cir. 1968).

Based upon the foregoing, Rapidair and St. Paul submit that the petitioners herein are not entitled to an attachment of Rapidair's aircraft liability insurance policy and that the District Court was correct in vacating said attachment and the Court of Appeals was correct in affirming.

POINT III

If the attachment is allowed it would be unconstitutional as a violation of due process and as an impairment of contract.

In his opinion for the Court of Appeals for the Second Circuit, Judge Friendly left no doubt that if the New York Courts were to allow a *Seider* v. *Roth* attachment in favor of non-residents, the constitutional objections to the entire *Seider* procedure would be insuperable:

> "* * * where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants." (Pet. App. B, p. 21)
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> "For reasons sufficiently indicated in *Minichiello* v. *Rosenberg, supra,* —— F. 2d at ——, ——, slip opinions at 581-83, and 1757-58 (concurring opinion of Judge Hays), and in this opinion, we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth* in favor of non-residents would be exceedingly serious. While that may be an understatement, it would be enough to dispose of this case if the plaintiffs were nonresidents who had suffered injuries or nonresident representatives of nonresidents who had been killed." (*Ibid.* p. 22)
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> "The constitutional doubt arises from New York's lack of meaningful contact with the claim; a court of another state cannot supply this by picking a New Yorker as administrator of the estate of a nonresident who suffered fatal injury." (*Ibid.*, p. 23)

In the present posture of the case, this constitutional issue is not raised, since the Courts below held only that under existing New York law a *Seider* v. *Roth* attachment is not available for the benefit of non-residents. However, if this Court should review this case, and if it should decide that the interpretation of New York law was incorrect and that a *Seider* v. *Roth* attachment is available for the benefit of these petitioners, then the question of the constitutionality of the *Seider* v. *Roth* procedure is squarely raised.

We submit that Judge Friendly's dictum is fully justified, and that if a *Seider* v. *Roth* attachment is granted in favor of non-residents where there are no New York contacts except the residence of the insurers, the *Seider* v. Roth procedure as applied in this case violates the provisions of the United States Constitution.

A. The attachment violates due process.

In determining whether or not the attachment herein violates the due process clause of the United States Constitution, the Court must determine whether or not the State of New York may require a non-resident not doing business here to defend himself in New York against a claim by a resident for damages resulting from an injury occurring in a state other than New York. In determining this issue we submit that the proper test is not whether or not an attachable debt exists in New York owed to the non-resident defendant,[1] but whether New York has suffi-

1. The concept that the obligations of the insurance contract constitute a debt located in the State of New York is at best a strained concept that is apparently justified only by the rule of *Harris* v. *Balk*, 198 U. S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905), a case considered by many to be an anachronism in determining the situs of an intangible obligation owed by a corporation. *Minichiello* v. *Rosenberg*, 410 F. 2d 106, 120 (dissenting opinion Anderson, J.).

cient contacts with the parties and issues so that requiring the non-resident to defend in New York would meet the basic requirements of fairness and justice. *Simpson* v. *Loehmann*, 21 N.Y. 2d 305, 311 (1967); *Atkinson* v. *Superior Court*, 49 Cal. 2d 338, 345-7, 316 P. 2d 960 (1957), appeals dismissed and cert. denied *sub nom. Columbia Broadcasting System, Inc.* v. *Atkinson*, 357 U. S. 569. As Chief Judge Fuld stated in *Simpson, supra*:

> "The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, e.g., *International Shoe Co.* v. *Washington*, 326 U. S. 310; *McGee* v. *International Life Insurance Co.*, 355 U. S. 220; *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke*, 15 N.Y. 2d 443). Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power." 21 N.Y. 2d at 311.

Approaching the problem from a practical appraisal of the facts we find that the only contacts that New York has with the instant lawsuit are the residency of the nominal plaintiffs and the fact that defendant's insurer has an office in the state through which it transacts business. On the other hand, the decedents were all non-residents; any recovery in the lawsuit will be for the benefit of non-resident next-of-kin; the defendant Rapidair is a Missouri corporation with its principal place of business in Missouri; St. Paul Fire and Marine Insurance Company is a Minnesota corporation with its principal place of business

in Minnesota; Rapidair's insurance policy was issued by a St. Paul agent in Illinois and delivered in Missouri; all of the other defendants are non-residents of the State of New York; the accidents occurred in the State of North Carolina; the decedents were passengers aboard an aircraft that originated its flight in Georgia, had scheduled intermediate stops in North Carolina and Virginia, and was to terminate its flight in Washington, D.C.; the travel of the decedents originated and was scheduled to terminate in states other than New York; and, as far as we are aware, none of the damage or liability witnesses reside in New York or are subject to subpoena by a New York court. With these facts it is difficult to see what interest New York has in this litigation.

Undoubtedly, the key case in determining whether the attachment herein violates due process is *Watson* v. *Employers Liability Corp.*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 74 (1954). In *Watson* the Supreme Court upheld the constitutionality of the Louisiana direct-action statute in an action brought by a Louisiana resident in a Louisiana court against a non-resident's insurer to recover for personal injuries sustained in Louisiana. Both the residency of the plaintiff and the place of the accident were in Louisiana. These two factors obviously formed a sufficient basis for the imposition of the Louisiana direct-action statute. However, when the sole contact is merely the residency of the nominal plaintiff, then a state has insufficient contacts with the event to constitutionally compel a non-resident to defend itself in that state. *Hanson* v. *Denckla*, 357 U. S. 235, 253-54, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958); *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed.

926 (1930); *International Shoe Co.* v. *Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *McGee* v. *International Life Insurance Co.,* 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *Minichiello* v. *Rosenberg,* 410 F. 2d 106 (2d Cir. 1968, dissenting opinion of Anderson, J.).

B. The attachment impairs the obligation of the insurance contract.

The supplemental order of attachment herein ordered the United States Marshal to levy upon the contractual obligation of St. Paul Fire and Marine Insurance Company "to defend and indemnify defendant Rapidair, Inc. under a policy of aircraft liability insurance issued by it to said Rapidair, Inc." The United States Marshal subsequently levied on Rapidair's aircraft liability insurance policy pursuant to said supplemental order of attachment. The notice of said levy provided, in part, that the property attached could not be lawfully released except by the direction of the United States Marshal, and specific reference was made to CPLR 6214(b). This attachment of St. Paul's duty to defend and indemnify Rapidair creates certain problems that clearly impair the obligations of St. Paul to Rapidair under the insurance contract.

Condition 3(a) of the insurance policy obligates St. Paul to—

> "defend any suit against the Insured alleging such injury to person or property and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as it deems expedient;"

At the time the attachment herein was filed, St. Paul was defending, on behalf of Rapidair, six *in personam* actions brought against Rapidair in North Carolina as a result of the Piedmont-Lanseair mid-air collision over Hendersonville, North Carolina, on July 19, 1967. The total damages sought in these six actions exceeded the coverage of the St. Paul policy.

As a result of the attachment herein, it is absolutely clear that St. Paul cannot pay any sums in settlement of the North Carolina cases pending against Rapidair. CPLR 6214(b). This prohibition can be extremely prejudicial to Rapidair if settlements in these six cases could be concluded on behalf of Rapidair for sums not in excess of the policy limits.

Since the suits in North Carolina are *in personam* actions against Rapidair, any judgments over and above the insurance policy coverage could be enforced against the personal assets of Rapidair, Inc. It is clear that Rapidair has a very definite interest in seeing the North Carolina actions settled prior to trial for amounts not in excess of the coverage limits.

St. Paul is equally interested in the possibility of settling whatever suits may be pending for reasonable amounts prior to trial not only in the hope of saving a portion of their coverage but also in avoiding the expenses of trial. However, no settlements of the North Carolina cases can be concluded while the present attachment is outstanding. Clearly, then, the attachment herein does impair the obligations of the insurance contract to the detriment of Rapid-

air, Inc., and St. Paul Fire and Marine Insurance Company.

The basis for the impairment herein is the construction given to Section 5201 of the New York Civil Practice Law and Rules by the New York Court of Appeals in *Seider* v. *Roth*, 17 N.Y. 2d 111 (1966), wherein the Court held that a liability insurance policy is a "debt" and subject to attachment under CPLR 6202. This construction of the statute is reviewable under Article I, Section 10, of the United States Constitution, which states that no State shall pass any law impairing the obligation of contracts. *Columbia Railway Gas & Electric Company* v. *State of South Carolina*, 261 U. S. 236, 43 S. Ct. 306, 67 L. Ed. 629 (1923); *Houston & Texas R.R. Co.* v. *Texas*, 177 U. S. 66, 20 S. Ct. 545, 44 L. Ed. 673 (1900).

In discussing what constitutes an impairment of contract in *Columbia Railway, supra*, the Court stated:

> "The impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency. 'Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.'" 261 U. S. at 236.

In so far as the present attachment prevents St. Paul from settling any cases other than the instant one, the attachment obviously impairs the contractual obligations of the insurance contract to the prejudice of Rapidair and St. Paul.

Although we have stated our objection in terms of impairment of contract, the validity of the attachment herein may also be viewed in due process terms. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178 (1934); *Home Insurance Company* v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926 (1930).

In the *Hartford* case, *supra*, the Supreme Court held that the State of Mississippi could not extend its own law to effect the rights of an insurance contract validly made in Tennessee. In holding such an extension unconstitutional as a violation of due process, the Court stated:

> "The Mississippi statutes, so contrued, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper* v. *California*, 155 U. S. 648; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 565-6; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 398-9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York Life Ins. Co.* v. *Head*, 234 U. S. 149; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407-8."
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>
> "* * * The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's

obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co.* v. *Dick, supra,* p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment." 292 U. S. at 149-150.

In light of the foregoing, it is submitted that the obligations of the insurance contract issued by St. Paul to Rapidair have been impaired by the attachment herein, and that said attachment is unconstitutional under Article I, Section 10, of the United States Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969

Office Supreme Court, U.S.
FILED
AUG 22 1969
JOHN F. DAVIS, CLERK

No. 370

GEORGE E. FARRELL, as Administrator de bonis non of the Estate of WYAND F. DOERNER, JR., deceased,
DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,
JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, deceased,
DANIEL DONNELLY, as Administrator de bonis non, cum testamento annexo of the Estate of J. DUDLEY HUTCHINSON, JR., deceased,
ANDREW P. O'ROURKE, as Administrator of the Estate of C. L. HUTCHERSON, JR., deceased,
GERALD A. ROBBIE, as Administrator de bonis non with will annexed of the Estate of JOSEPH EMILE BERMAN, deceased,
PAUL S. EDELMAN, as Administrator de bonis non with will annexed of the Estate of ELLEN S. LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,
PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of JAMES HENRY STUART, deceased, and
AMERICAN BANK & TRUST COMPANY, as Administrator cum testamento annexo of the Estate of THOMAS C. WHITE, deceased,
Petitioners,

against

PIEDMONT AVIATION, INC., THE BOEING COMPANY, and UNITED STATES OF AMERICA,
Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,
Respondents.

BRIEF OF THE RESPONDENT LANSEAIR, INC. AND THE GARNISHEE THE FEDERAL INSURANCE COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

BRIEF OF THE RESPONDENT LANSEAIR, INC. AND THE GARNISHEE THE FEDERAL INSURANCE COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This Brief is submitted on behalf of Lanseair Inc. and its aircraft liability insurer in opposition to the Petition for a Writ of Certiorari arising out of a mid-air collision between aircraft owned by Piedmont and Lanseair on July 10, 1967 near Hendersonville, North Carolina. The action was commenced in the United States District Court for the Southern District of New York. It is brought by non-residents against other non-residents who had no contacts with New York and arises out of an occurrence in another state.

Jurisdiction was based upon a contrived diversity of citizenship between nominal plaintiffs who are in New York and the various non-New York corporations. *In personam* jurisdiction was obtained over the defendants Piedmont Aviation Inc., The Boeing Company, and the United States of America. Thereafter petitioners sought to obtain *quasi in rem* jurisdiction over Lanseair, Inc. and Rapidair, Inc. by attaching the aircraft liability insurance policies issued respectively by The Federal Insurance Company and the St. Paul and Marine Insurance Company respectively.

Subsequently Lanseair, Rapidair, and their insurance companies moved to vacate the attachments, set aside the services of process and dismiss the actions against them. The Honorable Inzer B. Wyatt, United States District Court Judge, Southern District of New York granted the motions. *Farrell et al.* v. *Piedmont et al.*, 295 F. Supp. 228 (23-29).* On appeal, the United States Court of Appeals for the Sec-

* Unless otherwise designated, numbers in parentheses refer to pages of the Petition for Certiorari.

ond Circuit unanimously affirmed the decision below. *Farrell et al. v. Piedmont et al.*, —— F 2d —— (13-23).

The petitioners argued below, as they do here, that the Law of the State of New York permits the attachments in this action for the benefit of non-residents. Both the District Court and the Court of Appeals specifically rejected this argument. Among other things the lower courts held that such a denial did not violate either the Equal Protection or the Privileges and Immunities Clauses of the Constitution. A more detailed "Statement of the Case" will put the arguments of the Petitioners and the lower courts' rulings thereon in proper perspective.

Statement of the Case

These actions for wrongful death are being prosecuted by the personal representatives of the estates of thirteen (13) of the passengers who were aboard a Piedmont Airliner 727 Jet, manufactured by the Boeing Company, which collided with a Cessna 310 aircraft owned by Lanseair over Hendersonville, North Carolina. All seventy-four (74) passengers and five (5) crew members aboard the airliner as well as the pilot and two (2) passengers in the Cessna were killed.

The small plane was owned by the Respondent Lanseair, a Missouri Corporation. It was being operated by an employee of the Respondent Rapidair, also a Missouri Corporation. At all times referred to in the complaint and at all the times referred to in this proceeding, Lanseair was and still is a Missouri Corporation with its principal place of business in Missouri. None of Lanseair's officers or employees were residents of New York and Lanseair did no

business in New York. Thus Lanseair was not subject to *in personam* jurisdiction in New York. The only contact which Lanseair had with the State of New York was the fact that Federal, it's insurer, was doing business in the State.

Eight (8) of the deceased passengers represented herein were citizens of Mississippi, one (1) of Texas, two (2) of Tennessee and two (2) of Maryland. The beneficiaries of these wrongful death actions also reside in those several states. None of the tickets were purchased in New York, nor did the transportation call for flights from, to, or over the State. Indeed none of the deceased passengers had any contacts whatsoever with the State of New York. Their only contact came from the appointment of New York residents as Administrators.

The petitioners, all New York residents, were appointed as administrators by the Courts of the domiciles of their respective decedents. They were appointed solely for the purpose of maintaining these actions in the State of New York. Seven replaced executors previously named in the various other state courts.

Plaintiffs' attempt to obtain jurisdiction over Lanseair and Rapidair was based upon the decision of *Seider* v. *Roth*, 21 NY 2d 111 (1966), which permits a plaintiff to obtain *quasi in rem* jurisdiction over a non-resident defendant by attaching the liability insurance policy issued to the non-resident defendant. *In personam* jurisdiction was obtained over Piedmont, Boeing and the Government.

Following the attachment of its liability policy, Lanseair and Federal moved to vacate the attachment and to dismiss the complaints as to Lanseair. Similar motions were made by Rapidair and St. Paul. A motion to transfer this litigation was also submitted on behalf of the other defendants. In the course of their argument Petitioners claimed, among other things, that it was necessary to proceed in New York as they did because New York was the only state in which all defendants could be reached in one suit. Respondent demonstrated however that suits could be brought in North Carolina where all defendants could be reached.

After argument Judge Wyatt granted the motion of Lanseair and Rapidair and their insurers (23-28). He pointed out that the significant difference between *Seider* and the instant litigation was that the plaintiff in *Seider* was a New York resident. Thus he concluded that the *Seider* principle was not applicable to this litigation. He also pointed out that since he was transferring the action to North Carolina both Lanseair and Rapidair could be served in that State and would be required to defend the suit along with the other defendants.

The Court of Appeals for the Second Circuit affirmed. In its opinion (15-23) it pointed to the absolute lack of New York contacts except for the insurer's doing of business in the State of New York. Acknowledging the fact that the nominal plaintiffs had no real interest in the individual death claims, the Court of Appeals concluded that a court of another state could not supply a meaningful contact merely by picking a New York resident as administrator of the estate of a non-resident decedent.

Questions of constitutionality of the *Seider* procedure were raised by Lanseair and Federal at the trial level and in the Court of Appeals. It was contended that this attachment violates due process and is therefore unconstitutional. Both courts avoided the question by ruling that the *Seider* procedure does not apply to the instant fact situation because of the non-residency of the plaintiffs. However, both courts seem to have agreed that the attachment procedure is constitutional when employed by plaintiffs actually resident in New York. Further the Court of Appeals stated "we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth* in favor of non-residents would be exceedingly serious" (22)

The Petition for Certiorari

In an effort to reach this Court petitioners argue discrimination and equal protection. They also seek to establish that the lower court failed to follow the mandate of *Erie* v. *Tompkins* by not applying New York law. Neither contention forms a valid basis for granting certiorari. The courts below have clearly and completely dealt with the discrimination and equal protection arguments. There was no discrimination here and petitioners have equal protection. Furthermore, the courts below followed the New York decisions to the letter in ruling against petitioners.

POINT I

The history of the *Seider* procedure amply demonstrates that its sole purpose is to protect residents of the State of New York. There are no New York residents to be protected in this litigation. Consequently this Court should deny certiorari.

If there is any justification for the *Seider* procedure, which we doubt, it is the expressed desire to protect the residents of the State of New York. This social concept has led to many new and somewhat extraordinary and controversial conclusions in the decisional law of New York. In the instant case there are no New York residents to protect. The courts below have demonstrated that the New York law has absolutely no connection with this multiple litigation other than the fact that the insurers of Lanseair and Rapidair do business in New York.

The question of residency of the plaintiff has been considered closely by the Courts of New York in each of the *Seider* procedure cases. *Seider* v. *Roth,* 17 NY 2d 111, (1966) dealt with a New York resident plaintiff. Chief Judge Desmond speaking for the majority of the court in *Seider* wrote:

> "* * * there is no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont *injuring New York residents* any more than there was in *Oltarsh* v. *Aetna Ins. Co.* (15 N.Y. 2d 111) where for the first time we held that *when New York residents* were injured outside the State we would allow a direct action in New York against the insurer although there was nothing in previous New York law permitting it." (pp. 114-115). (Emphasis ours.)

In *Simpson* v. *Loehmann*, 21 NY 2d 305 (1967) reargument denied 21 NY 2d 990 (1968), Chief Judge Fuld reiterated the necessity for New York residence. He said:

> "Moreover *where the plaintiff is a resident of the forum state* and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York such factors loom large." (p. 311). (Emphasis ours.)

Another New York state court decision, *Vaage* v. *Lewis*, 29 AD 2d 315 (2nd Dept. 1968), reached a similar result where a non-resident sought an attachment under *Seider*. Like the case at bar the solitary nexus for the New York Courts in *Vaage* was the fact that the defendant's insurance company was authorized to do business in New York. A similar conclusion was reached by the Court of Appeals for the Second Circuit in *Minichiello* v. *Rosenberg*, 410 F2d 106 (1968) affirmed on rehearing 410 F2d 117 (1969), Petition for Certiorari filed with this court on May 29, 1969.

This was the history which the Second Circuit had before it when it considered the instant matter. Considering the jurisdictional facts in the light of this history, Judge Friendly wrote for the unaminous court:

> "Whatever the conceptual beauty of the (plaintiffs') argument, it neglects the facts. If we pass the New York citizenship of the administrators for the moment, *the action is by nonresidents against other nonresidents who have no contacts with New York, and arises*

out of an occurrence in another state. In truth the defendants 'own' nothing in New York or at least nothing that they do not own to the same extent in every state; their insurers are bound to defend and indemnify them wherever they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are *absolutely no New York contacts except for the doing of business by the insurers,* we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants." (20-21) (Emphasis ours.)

* * *

"For reasons sufficiently indicated in *Minichiello* v. *Rosenberg, supra,* ..... F. 2d at ....., slip opinions at 581-83, and 1757-58 (concurring opinion of Judge Hays), and in this opinion, we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth,* in favor of nonresidents would be exceedingly serious. While that may be an understatement, it would be enough to dispose of this case if the plaintiffs were nonresidents who had suffered injuries or nonresidents representatives of nonresidents who had been killed." (22)

Clearly therefore the Second Circuit acted properly in affirming Judge Wyatt's vacatur of the attachment. The only constitutional justification for the *Seider* "miracle" was the residence of the plaintiff. In effect, the New York Court of Appeals judicially created a direct action statute for the benefit of its residents. Indeed Judge Keating's concurrence in *Simpson* assumed that the Court of Appeals had created such a direct action procedure and that it was constitutional. *Simpson* v. *Loehmann,* 21 NY 2d 305, 312-14.

As this Court is aware statutes of this type have been held constitutional, *Watson* v. *Employers Liability Assurance Corp.*, 348 US 66 (1954). However in approving direct action procedures this Court has been careful to point out that they are justified only because they are directed to protect the interests of the residents of the State involved.

Contrary to petitioners' contention this desire to protect its citizens does not lead to a finding of discrimination or denial of equal protection. This exact point has been considered by this Court on several occasions. In *Toomer* v. *Witsell*, 334 US 385 (1947) at page 396 this Court pointed out that these constitutional provisions are not absolute. It said:

> "Like many other constitutional provisions the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."

Justice Frankfurter speaking for this Court in *Southern R. Co.* v. *Mayfield*, 340 US 1 (1950) discussed preferences given to residents of one state over another. He said at page 4:

> "But if a State chooses to [prefer] residents in access to often overcrowded Courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This

is true also of actions for personal injuries under the Employers Liability Act. *Douglas* v. *New York, N.H. & H.R. Co.*, 279 US 377, 387. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."

POINT II

The courts below properly applied New York law as it existed. The mandate of *Erie* v. *Tompkins* was explicitly observed.

The foregoing discussion of the status of the New York law on the *Seider* procedure amply demonstrates compliance by the Courts below with the mandate of *Erie* v. *Tompkins*, 304 US 64 (1937). Petitioners' argument seeks to confuse the clear purpose and intent of the New York Court of Appeals in arriving at this judicially created direct action statute. The same arguments were presented to the Second Circuit. It was answered by Judge Friendly when he concluded that "whatever the conceptual beauty of the argument, it neglects the facts" — F.2d— at p. —. (20)

Petitioners' argument also neglects the existing decisional law. Apparently it is petitioners' contention that since the highest court of the State of New York has never denied an attachment sought by a non-resident, the law on the question is contrary to that applied by Judge Wyatt and the Second Circuit. This is not the mandate of *Erie* v. *Tompkins*. We have already demonstrated a clear consideration of this question by the highest courts of New

York State. On two separate occasions the Court of Appeals has specifically noted the importance of the residence of the plaintiff.

Furthermore there is a decision on the very point by an Appellate Court. The highest New York court which has considered the specific question of attachment attempt by a non-resident was the Appellate Division, Second Department. In *Vaage* v. *Lewis,* 2d AD 2d 315 (1968) that court denied the attachment pointing specifically to the non-residence of the plaintiff.

POINT III

Forcing Lanseair or any similarly situated defendant to defend itself as required by *Seider* violates the due process clause.

The course of this litigation and the decisions below do not require this Court to consider the constitutional objection that *Seider* violates the due process clause. However in view of the fact that a Petition for Certiorari was filed on May 29, 1969 in *Minichiello* we believe this court should be made aware of the enormity of the complications to which *Seider* has given birth.

To say the least *Seider* violates the "traditional notions of fair play and substantial justice" referred to by this Court in *International Shoe Co.* v. *Washington,* 326 US 310, 316 (1945). We say this particularly when the impact of *Seider* is reviewed in a multiple disaster situation—where there are many plaintiffs seeking relief against a number of defendants in several jurisdictions. Furthermore

Seider, interpreted as Petitioners argue, would force Lanseair to defend itself in New York or face the possibility of a default judgment and subsequent rulings of collateral estoppel or res judicata. Petitioners' interpretation would also deprive other plaintiffs in other jurisdictions of an opportunity to benefit from the insurance protection afforded to Lanseair. If the policy limits are exhausted by way of attachment in one state, all other plaintiffs will be without financial relief except against the corporate defendant which often is without substantial assets.

CONCLUSION

This petition should be denied. The decisional law of the State of New York supports the lower courts' conclusions that non-residents are not entitled to *Seider* relief. This judicially created direct action statute for the benefit of New York residents is neither discriminatory nor a denial of equal protection.

Respectfully submitted,

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